



Signed and Filed: September 27, 2017

A handwritten signature in black ink, appearing to read "Hannah L. Blumenstiel", is written over a horizontal line.

HANNAH L. BLUMENSTIEL
U.S. Bankruptcy Judge
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:)	Case No. 16-10211 HLB
)	
PATRICK JAMES LEMIEUX,)	Chapter 7
)	
Debtor.)	
)	
MARSHAL (FORREST) HEWITT, et)	
al.,)	Adv. Proc. No. 16-03065 HLB
)	
Plaintiffs,)	
)	
v.)	
)	
PATRICK JAMES LEMIEUX,)	
)	
Defendant.)	

MEMORANDUM DECISION

I. INTRODUCTION

This matter came before the court on the complaint of Plaintiffs Marshal Hewitt, Adam Jenkins, and Michael Ross. The complaint sought denial of Defendant Patrick LeMieux's discharge, pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(3), (a)(4)(A), (a)(4)(D) and/or (a)(5), or in the alternative, an order declaring the specific debt owed by Mr. LeMieux to

1 Messrs. Hewitt, Jenkins, and Ross nondischargeable, pursuant to
2 section 523(a)(6).¹

3 On June 8, 2017, the court granted in part and denied in
4 part Mr. LeMieux's motion for summary judgment. The court
5 granted that motion with respect to the claims raised under
6 sections 523(a)(6), 727(a)(2)(A), 727(a)(3), and 727(a)(4)(D).
7 With respect to the claim for relief under section
8 727(a)(4)(A), the court granted summary judgment as to the
9 alleged failure to disclose, as well as alleged false testimony
10 regarding, loans from a bank account belonging to Mr. LeMieux's
11 wholly owned company, Soft Flow Water Treatment LLC ("Soft
12 Flow").² The court denied summary judgment as to the alleged
13 failure to disclose Mr. LeMieux's total income from Soft Flow.
14 Finally, the court denied summary judgment as to the claim for
15 relief under section 727(a)(5) with respect to certain ATM and
16 over-the-counter withdrawals from the Soft Flow account.³

17 The court held a trial on the surviving claims for relief
18 on July 7, 2017. Messrs. Hewitt, Jenkins, and Ross appeared
19 pro se. Mr. Jacob Faircloth appeared on behalf of Mr. LeMieux.
20 After both sides presented their testimony and evidence, the
21 court took the matter under submission.
22

23 ¹ Unless otherwise noted, all statutory citations shall refer to Title 11 of
24 the United States Code, aka the "Bankruptcy Code," and any references to rules
shall refer to the Federal Rules of Bankruptcy Procedure.

25 ² Soft Flow sets up equipment and accounts for water filtration systems and
26 then sells those accounts to third parties.

27 ³ The court will refer to the ATM and counter withdrawals collectively as
28 "Cash Withdrawals" which include both Mr. LeMieux's personal and Soft Flow's
business expenses. The court will refer to the portion of Cash Withdrawals
used only for Mr. LeMieux's personal expenses as "Personal Withdrawals."

1 This memorandum decision constitutes the court's findings
2 of facts and conclusions of law as required by Federal Rule of
3 Civil Procedure 52(a)(1), which applies in this proceeding
4 pursuant to Rule 7052.

5 **II. JURISDICTION**

6 The court has jurisdiction over this action pursuant to 28
7 U.S.C. § 1334, 28 U.S.C. § 157(a), and General Order 24 of the
8 United States District Court for the Northern District of
9 California. This is a core proceeding within the meaning of 28
10 U.S.C. §§ 157(b)(2)(I) and (J). Venue is proper under 28 U.S.C.
11 § 1409(a).

12 **III. FINDINGS OF FACT**

13 Between 2008 and 2011, attorney Brian Katz represented Mr.
14 LeMieux in a variety of legal matters. Mr. LeMieux, Mr. Katz,
15 and Messrs. Hewitt, Ross, and Jenkins were members of an
16 organization called "Yeyoung Culture Studies." In August 2011,
17 Mr. LeMieux hired Messrs. Hewitt, Ross, and Jenkins to work for
18 his company, Standard Fulfillment Services LLC ("Standard").
19 Standard was a marketing company associated with LeMieux Annuity
20 and Insurance Services, an insurance agency formed by Mr.
21 LeMieux. About a month after hiring Messrs. Hewitt, Ross, and
22 Jenkins, Mr. LeMieux fired them in an attempt to cut ties with
23 Yeyoung Culture Studies. Messrs. Hewitt, Ross, and Jenkins then
24 filed complaints with various government agencies regarding Mr.
25 LeMieux's business practices and disseminated those complaints to
26 the public.

27 In April 2013, Mr. Katz filed suit in state court against
28 Mr. LeMieux for unpaid attorney's fees. Believing Mr. Katz had

1 disclosed confidential information to Messrs. Hewitt, Ross, and
2 Jenkins to fuel their complaints, Mr. LeMieux filed a cross
3 complaint against Mr. Katz and Messrs. Hewitt, Ross, and Jenkins
4 asserting four causes of action: (1) libel; (2) intentional
5 interference with prospective economic advantage; (3) intentional
6 infliction of emotional distress; and (4) negligent infliction of
7 emotional distress. Messrs. Hewitt, Ross, and Jenkins responded
8 with an Anti-SLAPP⁴ motion, which the state court granted with
9 respect to all of Mr. LeMieux's causes of action except libel.⁵
10 The state court then entered a judgment in favor of Messrs.
11 Hewitt, Ross, and Jenkins for certain attorney's fees and costs
12 in the amount of \$22,906.18. As of the commencement of this
13 adversary proceeding, the balance due on that judgment totaled
14 \$25,202.46.

15 On March 16, 2016, Mr. LeMieux filed a voluntary petition
16 under Chapter 7 of the Bankruptcy Code, along with his schedules
17 and Statement of Financial Affairs ("SOFA"), in which he
18 disclosed his income, expenses, assets, and liabilities. Messrs.
19 Hewitt, Ross, and Jenkins take issue with the veracity of Mr.
20 LeMieux's disclosures, alleging that he failed to disclose income
21 he received from Soft Flow in the form of Cash Withdrawals, that
22

23 ⁴ California's Anti-SLAPP statute provides: "[a] cause of action against a
24 person arising from any act of that person in furtherance of the person's
25 right of petition or free speech under the United States Constitution or the
26 California Constitution in connection with a public issue shall be subject to
a special motion to strike, unless the court determines that the plaintiff has
established that there is a probability that the plaintiff will prevail on the
claim." Cal. Code Civ. Proc. 425.16(b)(1).

27 ⁵ California's Anti-SLAPP statute makes mandatory an award of attorney's fees
28 and costs to a prevailing defendant on a special motion to strike (an "Anti-
SLAPP motion"). Cal. Code Civ. Proc. § 425.16.

1 he failed to account for where that income went, and that he used
2 Soft Flow to hide his income from his creditors. On that basis,
3 they seek denial of Mr. LeMieux's discharge pursuant to sections
4 727(a)(4)(A) and (a)(5).

5 **A. Key Exhibits**

6 To demonstrate that Mr. LeMieux had failed to report income
7 from Soft Flow and had failed to adequately account for the
8 disposition of Cash Withdrawals from Soft Flow, Messrs. Hewitt,
9 Jenkins, and Ross relied primarily on Exhibits 6 and 7, which are
10 excerpts Mr. Hewitt extracted from the Soft Flow's general ledger
11 ("General Ledger"); and Exhibit 12, which is Mr. LeMieux's
12 response to Plaintiffs' Interrogatory number 13. As an initial
13 matter, the court notes that Messrs. Hewitt, Ross, and Jenkins
14 focused on Mr. LeMieux's gross income during the one year period
15 prior to the filing of Mr. LeMieux's petition (March 16, 2015 -
16 March 15, 2016, the "Prepetition Period"). Neither section
17 727(a)(4)(A) nor section 727(a)(5) has such a temporal
18 limitation. Instead, the focus should have been on the gross
19 income reported on Mr. LeMieux's bankruptcy documents: on
20 Schedule I (current monthly income) and on the SOFA (gross income
21 for the years 2014 and 2015, and 2016 income up to the petition
22 date). The court calculated income for these periods to the
23 extent possible based on the evidence introduced at trial.

24 Exhibit 6 is titled "Edited Ledger generated by Plaintiff
25 Marshal Hewitt, which omits charges prior to March 16, 2015 to
26 give totals for the year before bankruptcy." Mr. Hewitt
27 testified that Exhibit 6 represented his edited version of the
28

1 General Ledger and included only "member draws" taken during the
2 year prior to the petition date.

3 The ledger entries in Exhibit 6, however, go back as far as
4 January 2014 and only include January - August of 2015. So,
5 contrary to its title and Mr. Hewitt's testimony, it does not
6 cover the entire Prepetition Period. It also does not provide a
7 complete picture of the 2015 calendar year and contains no
8 information about Mr. LeMieux's 2016 year to petition date
9 income.

10 Mr. Hewitt included in Exhibit 6 the following categories of
11 transactions, which he and his co-plaintiffs deemed to represent
12 Mr. LeMieux's income from Soft Flow: "member draws," "ATM
13 withdrawals," "Charter Oak improvements," "counter withdrawals,"
14 "Debby's insurance business," "life insurance," "medical,"
15 "tickets," "transfer to personal account," "tuition," and "member
16 draws - other." Both Mr. LeMieux and his former accountant,
17 Manuel Pinto testified that generally, the "ATM withdrawals,"
18 "counter withdrawals," and "member draws" categories included
19 both personal and business expenses that would be reconciled
20 periodically as personal or business-related prior to preparation
21 of a tax return. In sum, Exhibit 6 does appear to provide
22 accurate information for 2014, for which a tax return had been
23 prepared and the personal and business expenses sorted out. It
24 provides only partial and unreliable information for 2015, as Mr.
25 Pinto stopped working for Mr. LeMieux in June 2015, did not
26 prepare a 2015 tax return, and therefore had not completed the
27 reconciliation of 2015 "member draws" "ATM withdrawals" and
28 "counter withdrawals" to the appropriate category: personal or

1 business expenses. Finally, Exhibit 6 is of no use for
2 calculating Mr. LeMieux's 2016 income to the petition date, or
3 his estimated current income.

4 Exhibit 7 is titled "Edited Ledger generated by Plaintiff
5 Marshall Hewitt, which omits charges after December 31, 2014 to
6 give totals for the year 2014." Contrary to its title, Exhibit 7
7 includes 2014 transactions as well as those that occurred from
8 January -August 2015. In addition, Exhibit 7 clearly includes
9 Soft Flow's business expenses in categories such as "freight
10 charges," "job materials" and "water filtration systems." So,
11 Exhibit 7 covers the same time period as Exhibit 6, but includes
12 Soft Flow's obvious business expenses. In other words, Exhibit 7
13 provides nothing beyond what Exhibit 6 contains to help determine
14 Mr. LeMieux's income, and in fact makes any such determination
15 more difficult by including Soft Flow's business expenses.

16 Exhibit 12 is Defendant's Response to Amended Interrogatory
17 13, in which Mr. LeMieux gave his "approximation and estimates"
18 of the disposition of Cash Withdrawals during the Prepetition
19 Period.

20 Mr. LeMieux relies primarily upon his Exhibit J, entitled
21 "Soft Flow Cash/ATM Withdrawals" to show the disposition of the
22 Cash Withdrawals during the Prepetition Period. Mr. LeMieux
23 testified that he prepared Exhibit J for purposes of trial. The
24 court has compared Exhibit J to Exhibit 12 and finds that Exhibit
25 J provides a more detailed accounting of the Cash Withdrawals,
26 including references to specific cashier's checks in Defendant's
27
28

1 Exhibit I.⁶ Further, Mr. LeMieux, to his own detriment,
2 allocated more of the Cash Withdrawals to his personal expenses
3 than he did in Exhibit 12, enhancing the credibility of Exhibit
4 J.

5 **B. Testimony at Trial**

6 Witnesses at trial included Mr. LeMieux; Mr. Pinto; Mr.
7 Pinto's former employee, Brett Gunari; Mr. LeMieux's former
8 spouse, Debra Curry; and Mr. Hewitt. The court found all
9 testimony to be credible, except that of Mr. Hewitt with respect
10 to his mathematical calculations, which the court finds
11 unreliable.

12 **1. Mr. Pinto's Testimony**

13 Mr. Pinto testified that the "member draws" column in the
14 General Ledger did not represent Mr. LeMieux's gross income.
15 Rather, that column was automatically populated from Soft Flow's
16 bank statements and included Mr. LeMieux's personal expenses,
17 principle payments on loans, and non-deductible business
18 expenses. Mr. Pinto further testified that he would discuss
19 periodically the "member draws" column with Mr. LeMieux to
20 identify the specific nature of each transaction as business or
21 personal.

22 Mr. Pinto testified that not all Cash Withdrawals were
23 attributable to Mr. LeMieux's personal expenses; some Cash
24 Withdrawals represented business expenses. Mr. Pinto stated that
25 he approached designation of the "member draws" items
26 conservatively; any item that Mr. Pinto concluded was not a

27
28 ⁶ Exhibit I was admitted into evidence only to the extent that Exhibit J
referred to it.

1 deductible business expense was, for tax purposes, designated a
2 personal expense of Mr. LeMieux.

3 Mr. Pinto testified that he stopped performing accounting
4 services for Mr. LeMieux and Soft Flow in June 2015, clarifying
5 that the General Ledger was not reconciled through that date
6 because they were working on expenses for prior months.

7 **2. Mr. Gunari's Testimony**

8 Mr. Gunari testified only briefly. In relevant part, he
9 attested that he perceived Mr. LeMieux as totally honest in all
10 of their dealings, and that Mr. LeMieux's 2014 tax return was the
11 last one Mr. Gunari prepared.

12 **3. Ms. Curry's Testimony**

13 Ms. Curry testified that, prior to June 2016, Mr. LeMieux
14 had been satisfying his child support obligation by paying her
15 and their children's rents, college tuition, utilities, and
16 certain household expenses. She testified that sometimes he
17 would pay via money orders or cashier checks directly to the
18 relevant landlord. Sometimes he would put cash directly into her
19 account. She testified that while they were married, Mr. LeMieux
20 did not excel at bookkeeping, did not write everything down, and
21 that he liked to pay in cash. She testified that Mr. LeMieux has
22 never paid court-ordered alimony of \$6,000 per month because he
23 could not afford to, and that she believed Mr. LeMieux has always
24 been honest with her about his financial situation.

25 **4. Mr. LeMieux's Testimony**

26 Mr. LeMieux testified to his practice of paying personal
27 expenses out of the Soft Flow account, and of reconciling those
28 expenses at the end of the year (with the assistance of his

1 accountant) on schedule C of his personal tax return. He further
2 testified that this had been his practice for many years and that
3 he has always relied on an accountant to figure out his personal
4 expenses and income at the end of the year.

5 Mr. LeMieux testified that he never took more cash from Soft
6 Flow than he needed for his immediate expenses. He explained
7 that he had limited cash and was barely scraping by as he tried
8 to build the Soft Flow business. And he stated that he paid by
9 cashier's checks and money orders to avoid bouncing checks. This
10 trial testimony is consistent with his deposition testimony.

11 [Pls.' Ex. 1 at 25:21-25; 38:5-14.]

12 Consistent with Mr. Pinto's testimony, Mr. LeMieux also
13 testified that the "member draws" column in Soft Flow's General
14 Ledger was a "catch all" for expenses that would be examined
15 later to determine which were personal and which were deductible
16 business expenses. Mr. LeMieux explained that Mr. Pinto would
17 send him a list of questions at the end of the year to confirm
18 the proper characterization of expenses identified as "member
19 draws."

20 Mr. LeMieux testified that his Exhibit J represented his
21 best estimate of the disposition of Cash Withdrawals during the
22 Prepetition Period (the period emphasized by Messrs. Hewitt,
23 Ross, and Jenkins). He maintained that many of his expenses were
24 fixed and that he had copies of cashier's checks to corroborate
25 his estimates, which he believes to be fairly accurate, if not
26 exactly correct. He described his approach to characterizing
27 expenses as business or personal as "conservative," meaning that
28

1 he erred on the side of reporting transactions as a personal
2 expenses rather than business expenses.

3 As of the trial, Mr. LeMieux had not filed his 2015 and 2016
4 tax returns because he does not have an accountant to prepare
5 them - Mr. Pinto stopped working for Mr. LeMieux in June 2015
6 because Mr. LeMieux could no longer pay him. Mr. LeMieux stated
7 that he cannot complete the tax returns without an accountant.

8 Given that he did not have tax returns for 2015 and 2016,
9 the disclosures in Mr. LeMieux's bankruptcy schedules and SOFA
10 represent his best, good faith estimates of income and expenses.
11 Mr. LeMieux explained that he estimated his income for purposes
12 of Schedule I based on the personal bills he paid during a 3-
13 month period in 2016. He testified that he brought his
14 bankruptcy attorney all bills - paid and unpaid - to calculate
15 his expenses for Schedule J.

16 **5. Mr. Hewitt's Testimony**

17 Mr. Hewitt testified that, according to his calculations,
18 \$27,247 in Cash Withdrawals remained unaccounted for in Mr.
19 LeMieux's Exhibit J. He explained that the Cash Withdrawals
20 labeled "personal expenses" were unaccounted for because,
21 according to Mr. Hewitt, Mr. LeMieux did not adequately explain
22 them.

23 Mr. Hewitt testified that Exhibit 6 showed \$22,654.95 in
24 Cash Withdrawals through August 2015. But it is unclear to the
25 court if Mr. Hewitt limited this calculation to transactions that
26 occurred within the Prepetition Period, or included all
27 transactions in Exhibit 6, i.e., back to January 2014.
28

1 Mr. Hewitt testified that Plaintiffs' Exhibit 7 consisted of
2 his edited version of the General Ledger as to Soft Flow's 2014
3 business expenses. Mr. Hewitt stated that the totals for 2014
4 were consistent with the expenses reported in Mr. LeMieux's 2014
5 tax return.⁷ The court has reviewed Exhibit 7 and agrees that
6 the totals for 2014 correspond with the expenses identified on
7 Mr. LeMieux's 2014 tax return.

8 Finally, Mr. Hewitt testified that there were a total of
9 \$52,026.80 Personal Withdrawals above and beyond the business
10 expenses in the General Ledger during the year prior to the
11 petition date. Plaintiffs' trial brief, however, stated this
12 amount as \$54,068.95. It is unclear to the court whether Mr.
13 LeMieux limited his calculations to the year prior to filing as
14 stated, or if they include transactions going back to January
15 2014, as set forth in Exhibit 6. And since Exhibit 6 did not
16 provide a complete picture of the year prior to the petition date
17 as Mr. Hewitt asserted it did, the court does not know the
18 sources upon which Mr. Hewitt basis this calculation.

19 Given the gaping holes and inconsistencies in the
20 Plaintiffs' evidence, the court does not find such evidence
21 reliable and will perform its own calculations based on what
22 trustworthy evidence it received.

23 C. 2014 Income

24 Mr. LeMieux reported gross income of \$49,021 on his SOFA for
25 the 2014 calendar year. [Pls.' Ex. 3 at 36.] Mr. Pinto
26 testified that he prepared Mr. LeMieux's 2014 tax return, which

27
28 ⁷ As noted previously, Although Exhibit 7 includes Soft Flow expenses for all
of 2014, it also includes expenses for January - August 2015.

1 shows combined income from Soft Flow and Ms. Curry's insurance
2 business of \$49,021. [Def.'s Ex. G.] Messrs. Hewitt, Ross, and
3 Jenkins did not offer any evidence to counter Mr. Pinto's
4 testimony or the accuracy of the 2014 tax return. In fact, Mr.
5 Hewitt confirmed that the expenses itemized in the 2014 tax
6 return corresponded with the General Ledger. Accordingly, the
7 court finds that Mr. LeMieux accurately reported his 2014 gross
8 income.

9 **D. 2015 Income**

10 Mr. LeMieux reported gross income of \$96,000 in his SOFA for
11 calendar year 2015. The evidence submitted at trial did not,
12 however, provide a complete and accurate picture of Mr. LeMieux's
13 2015 gross income that would permit corroboration of the
14 statements in his SOFA. Plaintiff's Exhibit 6 provided
15 information for January 2015 - August 2015; Defendant's Exhibit J
16 provided information for March 2015 - December 2015. The court
17 used these two exhibits to calculate Mr. LeMieux's 2015 income.
18 The calculation, however, is incomplete for the following
19 reasons: (1) Exhibit 6 does not show which Cash Withdrawals were
20 Personal Withdrawals; and (2) Exhibit J does not include any
21 personal expenses paid directly by Soft Flow. With that caveat,
22 the court calculated Mr. LeMieux's 2015 income as follows.

23 Income from Personal Withdrawals

24 From March 16, 2015 through December 31, 2015, Mr. LeMieux
25 made Personal Withdrawals in the amount of \$109,802.87. [Def.'s
26 Ex. J.] Mr. LeMieux made Cash Withdrawals of \$42,889.95 from
27 January 1, 2015 through March 15, 2015. [Pls.' Ex. 6. at 5-7.]
28 But, because Exhibit 6 does not identify whether any of the Cash

1 Withdrawals were for Mr. LeMieux's personal expenses, the court
2 will only consider the \$109,802.87 identified in Defendant's
3 Exhibit J.

4 Income from direct payment of personal expenses

5 Soft Flow paid the following personal expenses for Mr.
6 LeMieux during January 2015 through August 2015:

- 7 • Life Insurance - \$2,936.18
- 8 • Medical - \$727.53
- 9 • Tickets - \$1,955.76
- 10 • Tuition - \$6,733.79
- 11 • Miscellaneous expenses paid by debit card - \$6,575.30

12 [Pls.' Ex. 6 at 7-10.] In addition, the General Ledger shows
13 direct transfers to Mr. LeMieux's bank account totaling \$8,035.
14 The expenses and direct transfers total \$26,963.56. The court
15 has no evidence of direct payments of Mr. LeMieux's personal
16 expenses by Soft Flow for the period from September 2015 through
17 December 2015.

18 Adding together Personal Withdrawals and expenses paid
19 directly by Soft Flow, the court finds that Mr. LeMieux's gross
20 income for 2015 was approximately \$136,766.43 (\$109,802.87
21 Personal Withdrawals, plus \$26,963.56 personal expenses paid
22 directly by Soft Flow or funds transferred from Soft Flow's
23 account to Mr. LeMieux's personal account). This amount exceeds
24 Mr. LeMieux's reported gross income for 2015 by \$40,766.43.

25 **E. 2016 Year to Petition Date Income**

26 Mr. LeMieux reported \$24,000 year to petition date ("YTD")
27 gross income for 2016 in his SOFA. [Pls.' Ex. 3 at 35.] Mr.
28 LeMieux testified at trial that that he and his bankruptcy

1 attorney calculated the \$24,000 from paid bills he brought into
2 his attorney's office. [See also Pls.' Ex. 1 at 16:14-25; 25:12-
3 25; 26:2-10.]

4 Neither the General Ledger nor Mr. Hewitt's excerpts
5 therefrom (Plaintiffs' Exhibit 6) include any 2016 transactions.
6 Mr. LeMieux provided an accounting of Cash Withdrawals he took
7 from Soft Flow during the 2016 pre-petition period. [Def.'s Ex.
8 J.] Mr. LeMieux's Personal Withdrawals from January 1, 2016
9 through March 15, 2016 totaled \$21,364. [Id.] This amount, plus
10 any of his personal expenses paid directly by Soft Flow, should
11 add up to his total YTD gross income for 2016. Messrs. Hewitt,
12 Ross, and Jenkins did not, however, provide any evidence of Mr.
13 LeMieux's personal expenses paid by Soft Flow in 2016.

14 Based on the evidence before the court, Mr. LeMieux might
15 have overreported his 2016 YTD gross income by \$2,636. This
16 amount could very well be accounted for with evidence of
17 additional personal expenses paid directly by Soft Flow during
18 this period, but the court never received such evidence.

19 **F. Schedule I Income**

20 Mr. LeMieux reported monthly gross income of \$8,000 on
21 Schedule I. [Pls.' Ex. 3 at 30.] Mr. LeMieux testified that he
22 estimated this amount based on a 3-month average of bills he paid
23 in 2016. Mr. LeMieux's Personal Withdrawals from Soft Flow
24 during the 2.5 months pre-petition average out to \$8,545.60 per
25 month. [Def.'s Ex. J.⁸] Mr. LeMieux testified at his deposition

26
27 _____
28 ⁸ Mr. LeMieux's personal expenses paid directly by Soft Flow in 2016 could
make this average higher, but no one introduced that evidence during trial.

1 on February 9, 2017 that his gross income fluctuates from month
2 to month. [Pls.' Ex. 1 at 81:4-6.] So his average monthly gross
3 income could reach \$8,000 by the end of 2016.⁹ Given that these
4 numbers are reasonably close, the court finds that Mr. LeMieux
5 estimated his monthly gross income as of the petition date as
6 accurately as possible based on the information available to him.

7 **G. Disposition of Cash Withdrawals**

8 Messrs. Hewitt, Ross, and Jenkins focused on the Personal
9 Withdrawals Mr. LeMieux made during the Prepetition Period. Mr.
10 Hewitt testified that, in his mind, Mr. LeMieux had not
11 adequately explained the disposition of these funds.

12 The Personal Withdrawals by Mr. LeMieux for which a
13 disposition has not been specifically identified total
14 \$44,433.47. [Def.'s Ex. J.] Mr. LeMieux identified these
15 generally as "personal expenses". [Id.] Mr. LeMieux testified
16 that he used copies of cashier's checks to specifically identify
17 the disposition of the remaining Personal Withdrawals which, in
18 general, went toward rent, what he characterized as "alimony,"¹⁰
19 and his daughter's expenses. [Id.] Mr. LeMieux provided
20 evidence of the relevant cashier's checks in Defendant's Exhibit
21 I.
22
23

24 ⁹ For example, in June 2015, Mr. Lemieux did not pay any expenses with Cash
25 Withdrawals, whereas in the previous month he paid \$12,900 of his personal
expenses with Cash Withdrawals. [Def's. Ex. J at 330.]

26 ¹⁰ Mr. LeMieux testified that this category included support payments for his
27 children and was not part of the \$6,000 monthly alimony owed to Ms. Curry.
28 Ms. Curry's testimony corroborated that Mr. LeMieux had paid only child
support and no alimony.

1 The \$44,433.47 of unidentified "personal expenses" averages
2 out to \$3,703 per month. Beyond the rent, alimony, and expenses
3 for his daughter, Mr. LeMieux's Schedule J lists the following
4 personal expenses which may account for the \$3,703 unidentified
5 "personal expenses":

- 6 • Utilities - \$940¹¹
- 7 • Food and housekeeping supplies - \$600
- 8 • Clothing, laundry and dry cleaning - \$400
- 9 • Personal care products and services - \$100
- 10 • Medical and dental - \$280
- 11 • Entertainment, clubs, recreation, newspapers, and books
12 - \$500
- 13 • Insurance - \$400
- 14 • Taxes - \$400

15 [Pls.' Ex. 3 at 33.] These estimated expenses total \$3,620.
16 Exhibit 6, however, shows that Soft Flow was directly paying some
17 of the expenses listed on Schedule J, during March - August of
18 the Prepetition Period.

- 19 • Insurance - \$2,936 = \$489/month
- 20 • Medical - \$690 = \$115/month
- 21 • Miscellaneous expenses - \$6,025 = \$1,004/month¹²

22 These numbers are not reliable, because: (a) some of these
23 miscellaneous expenses could have been paid on behalf of his
24

25 ¹¹ This category includes electricity, heat, natural gas, water, sewer,
26 garbage collection, telephone, cell phone, internet, satellite, and cable
services.

27 ¹² Exhibit 6 includes an expense for parking tickets - \$1,954 = \$326/month
28 Schedule J does not include a line item that would encompass parking tickets
so that expense need not be considered when determining whether Schedule J
accounts for the unexplained "personal expenses."

1 daughter; (b) the court received no evidence that payment of
2 these expenses continued after August 2015 (other than Mr.
3 LeMieux's testimony that Soft Flow paid some of his expenses
4 directly); and (c) Mr. LeMieux testified that his income from
5 Soft Flow (in the form of payment of his expenses directly or
6 through Personal Withdrawals) fluctuated from month to month.
7 But, using what evidence the court has, Soft Flow appeared to be
8 paying approximately \$1,608 of the monthly expenses listed on
9 Schedule J. This leaves \$2,012 of Schedule J expenses that can
10 account for some of the \$3,703 unidentified "personal expenses"
11 Mr. LeMieux paid with Personal Withdrawals from Soft Flow. This
12 leaves an average of \$1,691 per month or \$20,292 of unidentified
13 "personal expenses" for the Prepetition Period.

14 **IV. CONCLUSIONS OF LAW**

15 **A. Denial of discharge pursuant to § 727(a)(4)(A)**

16 Section 727(a)(4)(A) denies a discharge to any debtor who
17 "knowingly and fraudulently" makes a false oath or account in the
18 course of the bankruptcy proceedings. 11 U.S.C. § 727(a)(4).
19 To succeed on a section 727(a)(4)(A) claim, a plaintiff must
20 show: (1) the debtor made a false oath in connection with the
21 case; (2) the oath related to a material fact; (3) the oath was
22 made knowingly; and (4) the oath was made fraudulently. Roberts
23 v. Erhard (In re Roberts), 331 B.R. 876, 882 (B.A.P. 9th Cir.
24 2005), aff'd and remanded, 241 F. App'x 420 (9th Cir. 2007). A
25 fundamental purpose of § 727(a)(4)(A) is to incentivize a debtor
26 to provide the trustee and creditors with accurate information so
27 that they do not need to conduct costly investigations. Fogel
28

1 Legwear of Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 62
2 (B.A.P. 9th Cir. 1999).

3 The parties objecting to discharge bear the burden of proof.
4 Fed. R. Bankr. P. 4005. The standard for that burden is a
5 preponderance of the evidence. Retz v. Samson (In re Retz), 606
6 F.3d 1189, 1196 (9th Cir. 2010). "In keeping with the 'fresh
7 start' purposes behind the Bankruptcy Code, courts should
8 construe § 727 liberally in favor of debtors and strictly against
9 parties objecting to discharge." Retz, 606 F.3d at 1196
10 (internal quotation marks and citation omitted). The "fresh
11 start" policy, however, is limited to the "honest but unfortunate
12 debtor." Grogan v. Garner, 498 U.S. 279, 286-87 (1991).

13 At summary judgment, the court concluded that Mr. LeMieux
14 had not disclosed all income he received from Soft Flow, but that
15 genuine issues of material fact existed as to whether this non-
16 disclosure was material or done with the requisite intent.
17 Accordingly, Messrs. Jenkins, Ross, and Hewitt needed to prove
18 the elements of materiality and intent by a preponderance of the
19 evidence in order to prevail at trial.

20 **1. 2014 Income**

21 The court has found that Mr. LeMieux accurately reported his
22 gross income for the calendar year of 2014. Accordingly, Messrs.
23 Hewitt, Ross, and Jenkins have not met their burden of proving by
24 a preponderance of the evidence that Mr. LeMieux made a false
25 statement with respect to his 2014 gross income. Therefore, they
26 cannot prevail under section 727(a)(4)(A) with respect to this
27 representation.

1 **2. 2015 Income**

2 **a. False Oath**

3 The court has found that Mr. LeMieux's 2015 gross income was
4 \$136,766.43, which is \$40,766.43 more than the gross income he
5 reported on the SOFA. A false oath includes a false statement or
6 omission in the debtor's schedules. Roberts, 331 B.R. at 882.
7 Accordingly, the court finds that Mr. LeMieux made a false
8 statement on his SOFA with respect to his 2015 gross income.

9 **b. Materiality**

10 Materiality is broadly defined. Id. at 883. "A false
11 statement is material if it bears a relationship to the debtor's
12 business transactions or estate, or concerns the discovery of
13 assets, business dealings, or the existence and disposition of
14 the debtor's property." Id. (quotation marks and citation
15 omitted). To be material, the false statement or omission need
16 not cause direct financial prejudice to creditors. Id. "An
17 omission or misstatement that detrimentally affects
18 administration of the estate is material." Retz, 606 F.3d at
19 1198. A false statement or omission, however, that has no impact
20 on a bankruptcy case is not material and does not provide grounds
21 for denial of a discharge under § 727(a)(4)(A). Khalil v.
22 Developers Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 172
23 (B.A.P. 9th Cir. 2007), aff'd, 578 F.3d 1167 (9th Cir. 2009). A
24 Chapter 7 debtor's non-disclosure of pre-petition income can be
25 material for purposes of 727(a)(4)(A). See Kluge v. RHI/10223
26 Sepulveda, LLC (In re Kluge), 2013 WL 1459274, at *3 (B.A.P. 9th
27 Cir. Apr. 10, 2013) (affirming finding of materiality when debtor
28

1 reported zero income from his business when his business made
2 monthly transfers of \$2,000 to his wife).

3 Here, Messrs. Hewitt, Jenkins, and Ross did not present
4 direct evidence of materiality at trial. Based on its own review
5 of the evidence, the court has found that Mr. Hewitt did not
6 disclose \$40,766.43 of gross 2015 income. This non-disclosure
7 does not appear to have impacted the bankruptcy estate at all.
8 Mr. Hewitt credibly testified that he put all net business income
9 back into Soft Flow to keep growing the business, and that he
10 limited his personal income from Soft Flow to what he needed to
11 meet his immediate expenses. Messrs. Hewitt, Jenkins, and Ross
12 did not provide any evidence to the contrary. Thus, though Mr.
13 LeMieux underreported his 2015 gross income, he had no net income
14 that could have been administered in the bankruptcy case. See
15 Rafsanjani v. Kuchecki (In re Kuchecki), 2010 WL 6259966, at *5
16 (B.A.P. 9th Cir. Nov. 29, 2010) (affirming finding that a \$79,000
17 discrepancy between the reported annual income from debtor's
18 business on the original and amended schedules was not material
19 because plaintiff had not considered costs of sales). Further,
20 the misreported income did not affect the administration of the
21 bankruptcy estate. See Wills, 243 B.R. at 64 ("a statement or
22 omission relating to an asset that is of little value or that
23 would not be property of the estate can be material if it
24 detrimentally affects the administration of the estate").
25 Accordingly, the court finds Mr. LeMieux's false statement
26 regarding his 2015 income to be immaterial.

1 **c. Intent**

2 **i. Knowing Failure to Disclose**

3 Even if the court did find Mr. LeMieux's non-disclosure of a
4 portion of his gross 2015 income to be material, Messrs. Hewitt,
5 Jenkins, and Ross also failed to prove that he omitted the income
6 with the requisite intent. "A person acts knowingly if he or she
7 acts deliberately and consciously." Roberts, 331 B.R. at 883. A
8 false statement resulting from ignorance, carelessness, or
9 recklessness does not rise to the level of "knowing and
10 fraudulent." Id.

11 The court finds that Mr. LeMieux did not knowingly make the
12 false statement regarding his 2015 gross income. Mr. LeMieux was
13 not adept at maintaining his financial records, and he had not
14 employed an accountant since June 2015. The General Ledger
15 prepared by Mr. Pinto only included Soft Flow's expenses - from
16 which Mr. LeMieux ultimately would derive his gross income -
17 through August 2015. So Mr. LeMieux did not have complete and
18 accurate information on which to base the information he included
19 in his bankruptcy schedules and SOFA.

20 The court also finds credible Mr. LeMieux's testimony as to
21 the methods he employed to estimate his gross income, namely by
22 taking an average of the bills he had paid during the three
23 months prior to filing. Though this approach did not produce an
24 accurate number, the court finds it to have been reasonable,
25 given Mr. LeMieux's lack of accounting expertise, his long-
26 standing practice of relying on accountants to determine his
27 gross income at the end of the year, and his inability to afford
28 an accountant in the year leading up to his bankruptcy filing.

1 Accordingly, the court concludes that Messrs. Hewitt, Ross,
2 and Jenkins have not proven by a preponderance of the evidence
3 that Mr. LeMieux's false statement regarding his 2015 gross
4 income was done knowingly.

5 **ii. Fraudulent Failure to Disclose**

6 And finally, Messrs. Hewitt, Jenkins, and Ross did not meet
7 their burden of showing fraudulent intent. To demonstrate
8 fraudulent intent, a plaintiff must show that (1) the debtor made
9 representations and/or omissions; (2) the debtor knew at the time
10 they were false; (3) the debtor made the representations with the
11 intention and purpose of deceiving creditors; and (4) the
12 representations and/or omissions were material. Roberts at 884
13 (citing Devers v. Mank of Sheridan (In re Devers), 759 F.2d 751,
14 753 (9th Cir. 1985)). Constructive fraudulent intent cannot be
15 the basis for the denial of a discharge; a plaintiff must
16 demonstrate actual fraudulent intent. Id.

17 "A debtor's fraudulent intent may be established by
18 circumstantial evidence or by inferences drawn from his or her
19 course of conduct. []. The requisite intent may be found from the
20 surrounding circumstances." Roberts at 884-85 (citations
21 omitted). While recklessness cannot meet the willfulness
22 requirement of section 727(a)(4), it can be probative of
23 fraudulent intent "where there has been a pattern of falsity or
24 from a debtor's reckless indifference to or disregard of the
25 truth." Khalil, 379 B.R. at 173.

26 Messrs. Hewitt, Ross, and Jenkins have tried to show that
27 Mr. LeMieux paid his personal expenses through Soft Flow to hide
28 his income from creditors. They have failed in this effort for

1 several reasons. First, it had been Mr. LeMieux's long-standing
2 practice to pay his personal expenses through his business and
3 there is no evidence that he only started doing so to evade
4 creditors. Second, Mr. LeMieux took no money from Soft Flow
5 other than what he needed to pay his immediate expenses. Third,
6 Mr. LeMieux was unable to pay all of his expenses, such as
7 alimony owed to Ms. Curry and fees owed to Mr. Pinto. And
8 finally, Mr. Pinto, Mr. Gunari, and Ms. Curry all testified -
9 credibly - that they found Mr. LeMieux to be honest with them
10 with respect to his finances. Messrs. Hewitt, Ross, and Jenkins
11 have provided no evidence whatsoever that, at the time he filled
12 out his SOFA, Mr. LeMieux knew the 2015 gross income he reported
13 was false or that Mr. LeMieux intended to deceive his creditors.

14 Accordingly, Messrs. Hewitt, Ross, and Jenkins have not
15 established their claim under section 727(a)(4)(A) with respect
16 to Mr. LeMieux's 2015 gross income.

17 **3. 2016 YTD Income**

18 As explained above, the court has found that Mr. LeMieux
19 overestimated his YTD 2016 gross income by \$2,636. The court
20 also finds that, based on the evidence, Mr. LeMieux reported his
21 YTD 2016 gross income as accurately as he could with the
22 information available to him. But even if the overestimation
23 constituted a false statement, the court finds it immaterial,
24 especially in light of Messrs. Hewitt, Ross, and Jenkins'
25 allegation that he **under**reported his income. Accordingly,
26 Messrs. Hewitt, Ross, and Jenkins have not met their burden of
27 demonstrating by a preponderance of the evidence that Mr. LeMieux
28 made a material false statement with respect to his 2016 YTD

1 gross income and they cannot prevail under section 727(a)(4)(A)
2 with respect thereto.

3 **4. Schedule I Income**

4 Schedule I requires only an estimate of a debtor's monthly
5 gross income, not an exact number.¹³ Mr. LeMieux's estimate
6 differed from the court's calculation (\$8,545.60) by only \$545.60
7 And the court found credible Mr. LeMieux's testimony that his
8 average monthly gross income could change during the course of
9 the year, as Mr. LeMieux's monthly gross income fluctuated.
10 Based upon its evaluation of the evidence, the court finds Mr.
11 LeMieux's estimate to be reasonable and not a false statement.
12 Accordingly, Messrs. Hewitt, Ross, and Jenkins have not met their
13 burden of demonstrating by a preponderance of the evidence that
14 Mr. LeMieux made a false statement on Schedule I. Thus, they
15 cannot prevail on their claim under section 727(a)(4)(A) with
16 respect to Mr. LeMieux's Schedule I income.

17 In sum, Messrs. Hewitt, Ross, and Jenkins have not
18 established that Mr. LeMieux knowingly and fraudulently made a
19 false statement in his bankruptcy documents. The court will
20 enter judgment in favor of Mr. LeMieux on the claim for relief
21 under section 727(a)(4)(A).

22 **B. Denial of discharge pursuant to § 727(a)(5)**

23 Section 727(a)(5) provides that the court shall grant a
24 discharge unless "the debtor has failed to explain
25 satisfactorily, before determination of denial of discharge under

26
27 ¹³ The instructions at the top of Schedule I state: "Be as complete and
28 accurate as possible." The instructions at Part 2 regarding monthly income
state: "Estimate monthly income as of the date you file this form." [Pls.'
Ex. 3 at 30.]

1 this paragraph, any loss of assets or deficiency of assets to
2 meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). To
3 succeed on a claim for relief under section 727(a)(5), a
4 plaintiff must prove the disappearance of substantial assets, at
5 which point the burden shifts to the debtor to explain the loss
6 of those assets. In re Fader, 414 B.R. 640, 645 (Bankr. N.D.
7 Cal. 2009) (citing Chalik v. Moorefield (In re Chalik), 748 F.2d
8 616 (11th Cir. 1984) and First Federated Life Ins. Co. v. Martin
9 (In re Martin), 698 F.2d 883 (7th Cir.1983)). A sophisticated
10 business person can be held to a higher standard of
11 accountability and record keeping. Fader, 414 at 645 (citing
12 Meridian Bank v. Alten (In re Alten), 958 F.2d 1226 (3rd Cir.
13 1992)).

14 The Ninth Circuit has not defined what constitutes
15 "substantial" assets. Bankruptcy courts in the Ninth Circuit
16 have found a wide range of assets to be substantial enough to
17 require an explanation of the loss thereof by a debtor. In re
18 Fader, 414 B.R. at 644 (\$210,000 of income); In re Wiseman, No.
19 07-10976, 2008 WL 5341023, at *4 (Bankr. W.D. Wash. July 18,
20 2008) (\$65,000 of trust funds); In re Johnson, 68 B.R. 193, 200
21 (Bankr. D. Or. 1986) (\$39,000 of income during one year prior to
22 filing).

23 At summary judgment, the court found that Mr. LeMieux did
24 not dispute that he took Personal Withdrawals from Soft Flow
25 during the year preceding his bankruptcy case, and admitted that
26 he did not keep records of how he spent that money. Accordingly,
27 the court denied Mr. LeMieux's motion for summary judgment on
28 this claim and found triable issues remained as to whether

1 substantial assets had disappeared and whether Mr. LeMieux could
2 satisfactorily explain such disappearances.

3 Messrs. Hewitt, Ross, and Jenkins focused on Personal
4 Withdrawals taken by Mr. LeMieux during the Prepetition Period,
5 asserting that Mr. LeMieux has not accounted for where this cash
6 went. After the court's calculations (based on Plaintiffs'
7 unreliable evidence), \$20,292 of the Personal Withdrawals Mr.
8 LeMieux made during the year prepetition remain unaccounted for.
9 That averages out to approximately \$55.59 per day of unaccounted
10 for personal expenses. The court does not find this amount to be
11 substantial, especially in light of the possibility that this
12 amount could be far less.

13 Regardless, the court finds that Mr. LeMieux adequately
14 explained the disposition of the Cash Withdrawals. He credibly
15 testified that they were used for his personal expenses and that
16 he did not have any money to spare beyond those expenses. As to
17 the accounting of those personal expenses, Mr. LeMieux's poor
18 accounting skills do not justify denial of his discharge,
19 particularly where his methods for estimating those expenses were
20 reasonable. "§ 727(a)(5) is not appropriately used to deny a
21 discharge to business operators who through inadvertence, lack of
22 competence, or both, maintain less than pristine financial
23 records." In re Knowling, 2011 WL 5024298, at *5 (Bankr. D. Or.
24 Oct. 20, 2011). No evidence submitted by Messrs. Hewitt,
25 Jenkins, and Ross has persuaded the court that Mr. LeMieux is
26 anything other than an "honest but unfortunate" debtor who should
27 receive a discharge.
28

1 The court finds and concludes that Mr. LeMieux has
2 adequately explained that the Personal Withdrawals paid for his
3 personal expenses. Having so found, Messrs. Hewitt, Ross, and
4 Jenkins cannot prevail on this cause of action. Accordingly, the
5 court will enter judgment in favor of Mr. LeMieux on the claim
6 for relief under section 727(a)(5).

7 **V. CONCLUSION**

8 For the foregoing reasons, the court finds in Mr. LeMieux's
9 favor on all claims raised by Messrs. Hewitt, Jenkins, and Ross
10 and will enter judgment accordingly.

11 ****END OF ORDER****

Court Service List

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